United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF FOR REHEARING EN BANC

affidavit Mailing —

74-1793

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1793

RACHEL EVANS, et al.,
Plaintiffs-Appellants,

—v.—

JAMES T. LYNN, et al.,
Defendants-Appellees,

TOWN OF NEW CASTLE, NEW YORK,
Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON REHEARING *EN BANC* FOR FEDERAL DEFENDANTS-APPELLEES

PAUL J. CURRAN,
United States Attorney for the Southern District of New York,
Attorney for Federal Defendants-Appellees.

V. PAMELA DAVIS,
STEVEN J. GLASSMAN,
Assistant United States Attorneys,
Of Counsel.

10

TABLE OF CONTENTS

TABLE OF CASES

STATUTES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1793

RACHEL EVANS, et al.,
Plaintiffs-Appellants,

—v.—

JAMES T. LYNN, et al.,
Defendants-Appellees,

TOWN OF NEW CASTLE, NEW YORK,
Intervenor-Appellee.

BRIEF ON REHEARING *EN BANC* FOR FEDERAL DEFENDANTS-APPELLEES

Statement of the Case

This is a rehearing *en banc*, granted on August 11, 1975, of an appeal of the dismissal of the complaint herein by United States District Court Judge Milton Pollack by opinion entered May 22, 1974. This opinion appears at 376 F. Supp. 327.

The appeal from the dismissal of the complaint was heard by a panel consisting of Judges Oakes, Moore and Gurfein. On June 2, 1975 the opinion of that panel was handed down, reversing the District Court's dismissal of the action to the Federal defendants, officials of the

Department of Housing and Urban Development (HUD), the Department of the Interior (Interior), and Bureau of Outdoor Recreation (BOR), and affirming the dismissal as to defendant Tri-State Regional Planning Commission.

Judge Oakes, writing for the majority, held that appellants did have standing to pursue the action against the Federal appellees. Judge Gurfein concurred in that result, and Judge Moore dissented.

Issues Presented

1. Do four black residents of Westchester County of low and middle incomes allege an injury in fact sufficient to support standing to sue by claiming that the Federal defendants failed to affirmatively further fair housing in the administration of urban development programs.

2. Does *Warth* v. *Seldin*, 91 Sup. Ct. 2197 (1975) apply to a challenge to two Federal grants-in-aid awarded to a town with allegedly restrictive zoning practices so as to mandate dismissal of the complaint for lack of standing?

Statement of Facts

A. The Appellants

The four appellants are minority group members who reside in Westchester County; they do not live in the Town of New Castle (J.A.* 2a-4a).

They have never tried to live in New Castle (J.A. 85a).

They have not alleged any plans to live in New Castle (J.A. 1a-16a).

---

* The Joint Appendix is designated "J.A." throughout.

The only appellant whose deposition was taken, Rachel Evans, declared at that deposition that she presently lives in decent housing and has no plans to move (J.A. 65a).

The four appellants do not allege that a change in the zoning of the Town of New Castle would result in housing which they could afford in New Castle, or, indeed, anywhere in Westchester County (J.A. 1a-16a).

They do not allege that the granting of these funds to New Castle has resulted in a deterioration of their own housing (J.A. 1a-16a).

They do not allege that they have ever been denied funds for an urban development program or that they have ever made application for such funds (J.A. 1a-16a).

They do not allege that the funds that have been granted to the Town of New Castle, would, if enjoined, be spent on improving or altering in any way their present housing conditions (J.A. 1a-16a).

They do not allege that an injunction against the two Federal grants would result in better housing conditions for them (J.A. 1a-16a).

B. The Federal Defendants

The Federal defendants are the Secretaries of the Departments of the Interior, and Housing and Urban Development, members of their staff and the two departments themselves.

C. The Town of New Castle

The Town of New Castle, in Westchester County, is zoned almost 90% for single family, residential housing (J.A. 95a).

It includes the King-Greeley Sanitary Sewer District (King-Greeley) within its geographic boundaries. The King-Greeley Sewer District was created pursuant to New York Town Law, Article 12-A (McKinney 1959) (J.A. 18ca).

In 1972-73, the Town of New Castle * applied for and was awarded two Federal grants from the two defendant Departments, Interior and HUD (J.A. 93a).

D. The Grants

The HUD grant was made pursuant to the Community Facilities and Advance Land Acquisition Act, 42 U.S.C. § 3101, *et seq.*, specifically § 3102 of that Title, Grants for Basic Water and Sewer Facilities (J.A. 18ca, 95a).

It was to provide matching funds for a sanitary sewer project in the King-Greeley district (J.A. 18ca, 95a).

The Interior grant was made pursuant to the Outdoor Recreation Programs Act, 16 U.S.C. 460(l) et seq., specifically § 460(l)-8 of the Act (J.A. 18ca-19ca).

It provides a portion of the funds needed to acquire a piece of marshland known as Turner Swamp, within the Town of New Castle, and convert it into an outdoor wildlife preserve (J.A. 18ca-19ca, 95a).

E. The Approval Procedures of the Departments

Title VI, Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. and Title VIII, Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.* impose obligations upon both HUD and Interior in making these grants. Title VI, specifically Section 2000d of Title 42, United States Code, requires that no person be excluded from participation in or

---

* The application for the HUD grant was actually made by the King-Greeley Sewer District (J.A. 18ca).

be denied the benefits of any program receiving Federal assistance on the grounds of race, color or national origin.

Title VIII, specifically Sections 3608(c) and (d)(5) of Title 42, United States Code,* require the Secretary of HUD and all executive departments and agencies respectively to administer housing and urban development programs in a manner affirmatively to further the purposes of the subchapter.

The purpose of the subchapter is stated in Section 3601 of Title 42, United States Code:

> It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.**

Both departments fulfill their Title VI obligation through an elaborate procedure of requiring advance assurances of compliance and then inspecting for compliance (J.A. 108a).

The Title VIII obligations are carried out in part by the use of a rating system for the grants which includes categories relevant to housing considerations in which the applicant can be awarded points (J.A. 222a and 230a are the respective rating sheets).

---

* The legislative history of Sections 3608(c) and (d)(5) sheds no light on the interpretation of these sections in this context. H.R. Rep. No. 473, 90th Cong. 1st Sess. (1967); S. Rep. No. 721, 90th Cong. 1st Sess. 1967).

** See Hearings on S. 1026, S. 131, etc. Before Sub-Committee on Constitutional Rights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess. 36, 50 (1967) for the original wording of the policy statement which was aimed specifically at prohibiting racial discrimination in housing.

It is apparent from the face of the HUD rating sheet * (J.A. 222a) and the accompanying regulations (J.A. 223a-229a) that specific housing considerations can earn an applicant up to 17 out of 100 points (J.A. 227a-228a). There are in addition other categories with fair housing implications such as the listings under Guiding Orderly Growth and Development (J.A. 226a-227a).

Robert Mendoza, the employee of HUD who personally visited New Castle and performed the rating in all categories except financial need, gave New Castle 2 out of 17 points under Housing Considerations (J.A. 222a, 187a, 188a, 189a). Mr. Mendoza stated in his deposition that had he known about a dispute between the Town of New Castle and the New York State Urban Development Corporation ("U.D.C."), it would have been appropriate to deduct more points (J.A. 194a-196a).

The sheet also includes a category for financial need in which New Castle was incorrectly awarded 9 points (J.A. 222a, 172a-176a). The incorrect rating was discovered and evaluated in a post-grant review (J.A. 172a-176a). Steps were then taken by HUD to investigate to see if there had been impropriety (J.A. 118a-119a) and to improve training of personnel performing financial ratings (J.A. 180a).

The implementation of Title VIII by the Bureau of Outdoor Recreation in its land acquisition programs consists primarily of planning and coordination with

---

* The original HUD rating sheet could not be found in the files of the HUD area office when the grant was reviewed (J.A. 139a-140a). The sheet was reconstructed for internal purposes by Robert Mendosa of HUD (J.A. 123a-125a). The accuracy of the reconstruction was established at Mr. Mendoza's deposition (J.A. 182a ff.).

other programs in order to achieve a balance between housing and recreational facilities. There is, in addition, a heavy emphasis on creating recreation areas in urban environments. This is accomplished by giving priority to projects in urban areas (J.A. 212a ff.).

The initial responsibility for rating the Interior land acquisition grants has been given to a State Liaison Officer (J.A. 201a), who operates pursuant to a Statewide Comprehensive Outdoor Recreation Plan or SCORP (J.A. 205a-206a). The creation and existence of this plan is a prerequisite for participation by a state in the Department's land acquisition program. The SCORP is continually updated for changing land use practices and population trends (J.A. 2072).

The priority for urban projects is implemented through both general policy and the rating system (J.A. 230a). Mr. Arnold, the Director for BOR for the North-East testified that BOR asks the State Liaison Officers to give top priority to urban areas (J.A. 212a).

The rating system (J.A. 230a) gives the largest number of points, 5 out of 14, for "Index of Relative Intensity of Need." This is a complex formula reflecting coordination with other land use and future needs of the area, according to the SCORP (J.A. 212a).

In addition, points are given for the degree of implementation of the SCORP, local economic impact and the variety of the population to be reached (J.A. 230a).

The projects approved by the State Liaison Officer are forwarded to the BOR office in Philadelphia for final review, site inspections and the decision to fund (J.A. 199a-199b a).

POINT I

The District Court properly dismissed the complaint for plaintiffs' failure to allege injury in fact sufficient to constitute standing to sue.

Justice Powell noted in his concurring opinion to *United States* v. *Richardson*, 418 U.S. 166, 194 (1974) that a revolution had taken place in the law of standing commencing with *Baker* v. *Carr*, 369 U.S. 186 (1962).

Whatever the parameters of this continuing revolution, the Supreme Court has recently reiterated that there has been no departure from the essential requirement that any and all plaintiffs must, before invoking the jurisdiction of the Federal Courts on any grounds, demonstrate a personalized, concrete injury in fact. *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974); *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208 (1974); *Warth* v. *Seldin*, 91 Sup. Ct. 2197 (1975).

These more recent cases candidly recognize that the revolution referred to by Justice Powell broadened the categories of judicially cognizable injuries. *United States* v. *Richardson*, *supra* at 179. The purpose of the recognition of the broadening, however, is clearly to provide a premise for the reemphasis of the continuing necessity for the plaintiff to demonstrate a genuine, concrete personal stake in the outcome, an injury in fact. Certainly they must demonstrate substantially more than generalized grievances with the policies of two Federal agencies. *Flast* v. *Cohen*, 392 U.S. 83 (1968); *O'Shea* v. *Littleton*,

supra; United States v. *Richardson, supra; Schlesinger* v. *Reservists to Stop the War, supra.**

Appellants argue in their Brief on Rehearing, p. 25, that a more liberalized view of injury in fact is appropriate in cases involving broad public policies. This argument results from appellants' failure to differentiate between judicial cognizance of a previously unrecognized injury and the requirement that injury is indeed suffered by the plaintiffs themselves.

Certainly, as Judge Oakes notes in his opinion, Title VI and Title VIII created new rights, new zones of interests (Slip Op. 3896), rights which are very far reaching indeed. These rights may be vindicated in a Federal Court but not before an essential requirement of standing to sue is met, the requirement of demonstrable injury in fact to each plaintiff differentiating that plaintiff from any other individual within such a broad zone of interests. *Warth* v. *Seldin, supra.*

The requirement that each plaintiff demonstrate injury in fact is the same for statutory as well as Constitu-

---

* Judge Oakes' opinion disregards this line of authority, Slip Op. 3898.9, on the incorrect assumption that these cases were meant to apply solely to Constitutional challenges for which, apparently, he would erect different standards. Apart from the fact that *O'Shea* v. *Littleton* was concerned with standing to pursue a remedy under Title 42, United States Code, sections 1981-1983 and 1985, the Supreme Court clearly intends its analysis of injury in fact to apply equally to all such categories of standing as still remain in the lexicon. Thus, *Flast* v. *Cohen*, a "taxpayer" suit, is cited as authority in *Schlesinger* v. *Reservists to Stop the War*, a "citizen" suit, as are such varied cases as *Baker* v. *Carr, supra; Sierra Club* v. *Morton*, 405 U.S. 727 (1972) and *Ex Parte Lévitt*, 302 U.S. 633 (1937). In *O'Shea* v. *Littleton*, the Supreme Court specifically noted that the injury test is the same for Constitutional and statutory challenges. 414 U.S. 488, 493 (1974).

tional challenges, *O'Shea* v. *Littleton, supra;* it is equally applicable to plaintiffs claiming to be aggrieved under the Administrative Procedure Act, 5 U.S.C. § 702, *Sierra Club* v. *Morton, supra.*

An examination of those plaintiffs who have been afforded standing to sue under Title VIII highlights the difference between a demonstrable injury in fact and the insufficient claims of the appellants.

A person who claims that housing has been discriminatorily denied to him may sue under the specific language of the statute. Section 810(a) of the Civil Rights Act of 1968, 42 U.S.C. 3610(a). Appellants made no such claim.

Present tenants in a building whose landlord is allegedly discriminating against others may also sue. *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 at 209 (1973) where it was held:

> With respect to suits brought under the 1968 [Civil Rights] Act, we reach the same conclusion [of acceptable standing], insofar *as tenants of the same housing unit that is charged with discrimination are concerned.* (Emphasis supplied)

Appellants are not suing about their own housing units. They are not suing about any housing unit. They are suing about a sewer and a park in another town.*

---

* Nor do the appellants here rely on the exceedingly broad statutory definition of "aggrieved person" contained in Section 810(a) of the Civil Rights Act of 1968, 42 U.S.C. § 3610(a), which was the underpinning for the finding in *Trafficante* that in order to effect the purposes of the Act the petitioners must have standing.

Minority group members who are to be displaced from present housing by a new housing program may sue. *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *Powelton Civic Home Owners Association* v. *HUD*, 284 F. Supp. 809 (E.D. Pa. 1968). Appellants are in no way threatened by displacement.

Potential residents of a Federally assisted housing project may sue. *Gautreaux* v. *Chicago Housing Authority*, 265 F. Supp. 582 (N.D. Ill. 1967). There is, of course, no Federally assisted housing project involved here. Nor have appellants ever tried to live in New Castle. One appellant, Mrs. Rachel Evans, declared, at her deposition, that she lived in decent housing and intended to remain there (J.A. 65a).

All persons who live in or do business in an urban renewal area may sue. *Shannon* v. *HUD*, 436 F.2d 809 (3rd Cir. 1970). There is no urban renewal area in this case. Appellants neither live nor do business even near the sewer and park areas.

The liberalization of judicially cognizable rights may not logically or legally be taken as an abandonment of the requirement that plaintiffs asserting those rights must allege that they themselves have been injured by the violation of those rights. *United States* v. *Richardson*, *supra* at 179-80.

The dismissal of the complaint by the District Court should be affirmed.

POINT II

Neither Title VI nor Title VIII provides standing for four low and middle income individuals to obtain overall review of Federal agencies' enforcement policies.

The Federal appellees argued before the panel on this appeal that the appellants did not have standing to enjoin the two grants to the Town of New Castle. The two opinions which form the majority of that panel suggest that the remedy that the appellants have standing to seek is not an injunction but rather is directed at an overall review of the Federal agencies' policies in connection with such grants. Those observations serve only to further dilute the requisite injury in fact on the part of appellants, and emphasize the lack of sufficient adversity to establish standing.

The struggle for a consistent, coherent analysis of standing continues unabated and the more familiar opinions which followed *Baker* v. *Carr*, e.g. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970); *Barlow* v. *Collins*, 397 U.S. 159 (1970); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1973); *United States* v. *SCRAP*, 412 U.S. 669 (1973), must be read in the context of the most recent pronouncements from the Supreme Court, e.g. *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974); *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208 (1974); *Warth* v. *Seldin*, 91 Sup. Ct. 2197 (1975). This continuing attention to the developments in the judicial analysis of the law of standing is particularly necessary since standing is a creature

of the judiciary with no statutory or procedural underpinning.*

What is meant by substantially more than generalized grievances has been variously articulated as "a personal stake in the outcome of the controversy," *Baker* v. *Carr*, *supra* at 204; "injury in fact," *Association of Data Processing Service Organizations* v. *Camp*, *supra* at 152; and more than "abstract injury," *O'Shea* v. *Littleton*, *supra* at 494. One need not look beyond the four opinions which have already been handed down in this action to appreciate that the mere recital of the standard is far from dispositive of the issue. Rather it is essential to view the standard in the context of the facts of the cases, *Association of Data Processing Service Organizations, Inc.* v. *Camp*, *supra* at 151, which must inevitably include reference to the remedy for which standing is sought. This approach was approved in *Schlesinger* v. *Reservists to Stop the War* wherein the Court cited the following:

> The desire to obtain [sweeping relief] cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires *the remedy for which he asks.* (Emphasis added) *McCabe* v. *Atchison, & T.S.F.R. Co.*, 235, 151, 164 (1914) cited at 418 U.S. 208, U.S. 221-2 (1974).

In other words, one measure of whether or not the proposed plaintiff has alleged a sufficiently concrete, per-

---

* There is no direct reference to standing as such in the Federal Rules of Civil Procedure or Title 28, United States Code. To the extent that reference is made to a source for the requirement of standing the opinions cite the "case or controversy" clause in Article III of the Constitution. *Baker* v. *Carr*, *supra*; *Flast* v. *Cohen*, *supra*; *United States* v. *Richardson*, *supra*; *Schlesinger* v. *Reservists to Stop the War*, *supra*. It is equally a matter of prudential considerations. *Warth* v. *Seldin*, *supra* at 2206.

sonal stake in the outcome of the litigation is to look at the relief sought and determine whether that relief, if granted, would ameliorate the alleged injury, *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973), whether the plaintiffs "personally would benefit in a tangible way from the courts' intervention." *Warth* v. *Seldin, supra* at 2210.

If the relief required to ameliorate the injury is not particularized, it would follow that the injury is not the personalized, particularized injury which confers standing. *Warth* v. *Seldin, supra; Laird* v. *Tatum*, 408 U.S. 1 (1972); *Schlesinger* v. *Reservists to Stop the War, supra.*

Indeed, where the relief necessary to remedy the injury would involve the Court in a continuous monitoring of the policies of one of the other two coordinate branches of government, standing has consistently been denied. *Laird* v. *Tatum, supra; O'Shea* v. *Littleton, supra; United States* v. *Richardson, supra.*

In the two opinions which constitute the majority of the panel herein, both Judge Oakes and Judge Gurfein viewed the remedy for the plaintiffs' injury as a review of the enforcement policies of the two Federal agencies in connection with Title VI and Title VIII (Slip Op. 3898-9, 3917-8). While it is unclear what steps the Court could take were these policies found wanting,* the Court would necessarily be involved in a broad overview of their functions.

A similar analysis applied to the line of authority most heavily relied upon by the appellants reveals that such

---

* It is clear that no court has the power to issue advisory opinions. *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971); *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89 (1947); *Muskrat* v. *United States*, 219 U.S. 346, 351-3 (1911).

reliance is inappropriate. Both *Trafficante* v. *Metropolitan Life Ins. Co., supra* and *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir., 1973) involved alleged or actual acts of discriminatory conduct of the sort specifically forbidden by Title VI (*Adams*) and Title VIII (*Trafficante*). In *Adams*, plaintiffs sought the specific remedy of requiring that the statutory mechanism provided for in Title VI be invoked against those school boards which had already been found in violation of the law. The plaintiffs in *Trafficante* sought only to invoke the statutory remedy in Title VIII against their own landlord for unlawful, discriminatory conduct. The claim of the plaintiffs herein for enforcement of the statute against discriminatory conduct is totally different. First, there is no issue anywhere in this case of any unlawful, discriminatory conduct. There is no allegation that the grants themselves will be administered discriminatorily. There is no allegation that the zoning policies of the Town of New Castle are themselves a violation of any statute or part of the Constitution. The "enforcement" of the act that is sought is the enforcement of that section which requires the Secretary of HUD to affirmatively further the policy of fair housing throughout the United States in all urban development programs. 42 U.S.C. § 3608 (d) (5).*

United States v. *SCRAP*, *supra*, while considered one of the authorities for the most liberal view of the law of standing, nevertheless involved a similarly concrete and specific remedy, the invalidation or modification of a particular freight rate increase which had been approved by

---

* The recently enacted Housing and Community Development Act of 1974, Pub. Act. 93-383, 42 U.S.C. 5301 *et seq.*, contrary to the assertions of the Brief of Appellants on Rehearing, does little to illuminate the parameters of this section. While the goals of "fair housing" are more particularly set forth, the methods of achieving these goals, particularly where, as here, no housing project is involved, are not so particularized.

the Interstate Commerce Commission. Similarly, in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), plaintiffs sought review of the approval by the Secretary of Transportation of the route of a Federal highway which would affect a public park in Memphis, Tennessee, and *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), involved a particular license for a hydro-electric project. In each of these cases the injury which the plaintiffs alleged was sufficiently specific, concrete and personalized to be alleviated by a specific, and concrete remedy. It is totally inappropriate to analogize the failure of an agency to suspend a particular freight rate increase (*United States* v. *SCRAP*, *supra*) to the failure of two agencies to effectuate policies which could encourage fair housing for all of plaintiffs' proposed class (Slip Op. 3898).

If plaintiffs herein do not have standing to seek an injunction against the grants in aid, then they do not have standing to pursue the suit at all and the dismissal of the complaint must be affirmed. To hold otherwise is to involve this Court in precisely the sort of judicial interference in the functioning of the Executive Branch which the Supreme Court has clearly forbidden. *Laird* v. *Tatum*, *supra*; *United States* v. *Richardson*, *supra*, and *Schlesinger* v. *Reservists to Stop the War*, *supra*.

POINT III

Appellants do not have standing to attack the zoning and land use policies of the Town of New Castle.

The Supreme Court has recently affirmed the Second Circuit's decision in *Warth* v. *Seldin*, *supra*, holding that persons of low and moderate income may not claim that exclusionary zoning practices have injured them without a concrete showing of how a change in the zoning practices would directly benefit the plaintiffs.

An attack on the zoning of the Town of New Castle is at the heart of the complaint herein. There is no allegation in this action that the two grants-in-aid are in and of themselves discriminatory or unlawful. Rather, it is only because of the nature of the recipient of the grants, the Town of New Castle, that the grants are challenged. Appellants claim that they now live or did live in unsatisfactory housing. They further claim that the zoning of the Town of New Castle prevents low income or multi-family housing. What they do not allege is any connection between their own plight and the existence of a community with minimum acreage zoning. They do not show that their present housing is the result of the zoning of the Town or that a change in the Town's zoning would alter their present housing conditions. In connection with their allegations concerning the two grants, they make no showing that the enjoining of the grants would result in any amelioration of their claimed injury whatsoever. They do not allege that they or any organization with which they are connected made any application for similar grants much less that such application was ever denied by defendants herein. They make no showing that the money which would otherwise go to New Castle would, if enjoined, be used to provide better housing conditions for them.

The lack of these allegations is fatal to the appellants' action under the clear holding of *Warth* v. *Seldin, supra.*

> Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the Court affords the relief requested, the asserted inability of petitioners will be removed. 91 Sup. Ct. 2197 at 2208.

In *Warth* the plaintiffs were directly challenging the zoning practices of the Town of Penfield. The intervening factor of the two Federal grants in this action does not alter the dispositive applicability of *Warth*, for, as stated above, it is only via the nature of New Castle's zoning that the grants can be viewed as illegal. If potential plaintiffs must show that the zoning of an area caused the plaintiffs' injury in order to attack it directly, then appellants must surely show that the zoning, through or by the grants, caused their injury in order to attack the zoning indirectly.

They have not done so. They have shown only a strong concern with the problems of housing in Westchester County and a grievance with the Federal agencies for "rewarding" a town which they believe should alter its housing practices. This is precisely the sort of generalized grievance which is insufficient to invoke the judicial power of the Federal courts and which the Supreme Court has suggested is properly resolved by the political process. *United States* v. *Richardson, supra; Schlesinger* v. *Reservists to Stop the War, supra.*

CONCLUSION

For the foregoing reasons, the dismissal of the complaint by the District Court should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the
Southern District of New York,
Attorney for Federal Defendants-Appellees.

V. PAMELA DAVIS,
STEVEN J. GLASSMAN,
Assistant United States Attorneys,
Of Counsel.

October, 1975

★ U. S. Government Printing Office 1975— 614—350—099

Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

CA 74-1793

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn,
deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 14th day of October 19 75 she served ~~a copy~~ 2 copies of the within

govt's brief on rehearing en banc

by placing the same in a properly postpaid franked envelope addressed:

Richard F. Bellman, Esq.,
57 Tuckahoe Road
Yonkers, NY 10710

And deponent further says she sealed the said envelopes and placed the same in the mail box ~~mail chute drop~~ for mailing in the ~~United States Courthouse~~, outside US Crt Hse Foley Square, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

14th day of October 19 75

Ralph L. Lee

RALPH L LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977